No. 88-1224 (3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

MICHAEL REED,

Petitioner,

vs.

NORTHWESTERN PUBLISHING CO., d/b/a THE COMMERCIAL NEWS, BOB WILSON and CARL YOUNG,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF FOR RESPONDENTS NORTHWESTERN PUBLISHING CO. d/b/a THE COMMERCIAL NEWS, BOB WILSON and CARL YOUNG IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

NIXON, HARGRAVE, DEVANS & DOYLE
John B. McCrory
(Counsel of Record for Respondents)
William S. Brandt
One Thomas Circle, Suite 800
Washington, D.C. 20005
(202) 223-7200

ACTON, MEYER, SMITH & MILLER
Thomas B. Meyer
11 East North Street
Danville, Illinois 61832

Attorneys for Respondents Northwestern Publishing Co., d/b/a The Commercial News, Bob Wilson and Carl Young

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Daily Record Corporation
Rochester, New York

(15354)

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	*ii*
RULE 28.1 LIST	1
OPINIONS BELOW	2
JURISDICTIONAL STATEMENT	2
STATEMENT OF THE CASE	2
REASONS FOR NOT GRANTING THE PETITION	3
CONCLUSION	4

TABLE OF AUTHORITIES

	Page
New York Times v. Sullivan, 376 U.S. 254 (1964)	3
Rule 17.1, Rules of the Supreme Court of the United States	3
28 U.S.C. § 1257(3)	2

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RULE 28.1 LIST

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Respondent Northwestern Publishing Company herein discloses that it is a wholly-owned subsidiary of Gannett Co., Inc.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois is found in Petitioner's Appendix ("PA") at 1a and 124 Ill.2d 495, 530 N.E. 2d 474, 125 Ill. Dec. 316 (1988). The opinion from the Appellate Circuit Court of Illinois, Fourth District is found at 65a and 159 Ill. App. 3d 699 (1987).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

The Petitioner, Michael Reed, brought an action for libel against Respondent Northwestern Publishing Company, publisher of *The Commercial News*, a newspaper in Danville, Illinois, and against two of its reporters, Respondents Bob Wilson and Carl Young. Wilson and Young were the authors of some of the allegedly defamatory material concerning Petitioner which appeared in *The Commercial News*.

The case was tried to a jury commencing June 16, 1986. At the conclusion of the trial, the jury was asked to answer six special questions. As to Respondent Wilson's articles, although the jury found them to be defamatory and false, the jury found that they were not published with constitutional "actual malice". As to the articles authored by Respondent Young, the jury found that they were not "of and concerning" the Plaintiff, and that they were neither false or defamatory, nor published with actual malice.

Based on the jury's answers to the special questions, judgment was entered in favor of the Respondents *The Commercial News* and Wilson. Petitioner's motions for judgment notwithstanding the verdict and for a new trial were denied.

Plaintiff pursued two unsuccessful appeals through the Illinois courts raising the identical issue raised in his present Petition, *i.e.*, whether Petitioner, a policeman, was a public official to whom the "actual malice" test of *New York Times v. Sullivan*, 376 U.S. 254 (1964), and its progeny applies.

REASONS FOR NOT GRANTING THE PETITION

This Court should grant a Writ of Certiorari only where special and important reasons are shown. (Rule 17.1, Rules of the Supreme Court of the United States.) The issue raised by Petitioner here is whether a police officer is a public official to whom the "actual malice" test applies.

In support of that issue, Petitioner makes virtually the identical arguments he raised in both Illinois appellate courts. (Petitioner's brief on this issue in the Supreme Court of Illinois is reproduced in the Appendix to this brief.)

Each of Petitioner's arguments was carefully identified and analyzed by the Supreme Court of Illinois. The Supreme Court of Illinois concluded in a careful, thorough and thoughtful opinion that each of Petitioner's arguments were without merit. (12a-23a). The Petitioner here does not challenge the opinion of the Supreme Court of Illinois; he merely repeats the arguments made to that Court.

Respondents find it difficult, if not impossible, to improve upon the Illinois Supreme Court's opinion.

This case does not raise important questions of federal law, and the Supreme Court of Illinois correctly applied the governing law. Respondents therefore choose to rely on that opinion as its opposition to Petitioner's submission.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: February 14, 1989

Respectfully submitted,

NIXON, HARGRAVE, DEVANS & DOYLE
John B. McCrory
(Counsel of Record for Respondents)
William S. Brandt
One Thomas Circle, Suite 800
Washington, D.C. 20005
(202) 223-7200

ACTON, MEYER, SMITH & MILLER
Thomas B. Meyer
11 East North Street
Danville, Illinois 61832

Attorneys for Respondents
Northwestern Publishing Co.,
d/b/a The Commercial News,
Bob Wilson and Carl Young

APPENDIX

Excerpts From Petitioner's Brief in the Illinois Supreme Court

ARGUMENT I

THE APPELLATE COURT ERRED IN HOLDING THAT PLAINTIFF WAS A PUBLIC OFFICIAL AS A MATTER OF LAW AND THAT PLAINTIFF WAS REQUIRED TO PROVE THAT THE DEFENDANTS PUBLISHED WITH "ACTUAL MALICE."

In the landmark 1964 decision of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), the Supreme Court held that, in order to recover for libel, a "public official" who was criticized in his official conduct must show with convincing clarity that the defendant acted with actual malice. In so doing, the Court safeguarded against excessive self-censorship, thus eliminating the "pall of fear and timidity imposed upon those who would give voice to public criticism, an atmosphere in which First Amendment freedoms cannot survive" (376 U.S. at 278). Excessive self-censorship is obviously harmful in a system of popular sovereignty. However, the Court undoubtedly realized that society also has a responsibility to protect an individual's reputation. Thus, the Court applied the stringent New York Times requirements only within the boundaries of "public officialdom."

The Court in New York Times did not define the term "public official" and declined to answer in detail the question of how far down into the lower ranks of government employees the "public official" designation would extend for purposes of the rule and did not specify categories of persons who would or would not be included or determine the boundaries of the official conduct concept (376 U.S at 283 note 23).

An examination of the precedents relied upon by the Court in New York Times provides some guidance concerning the scope of the "public official" concept. A careful analysis of the decisions relied upon discloses that none of them involved lower echelon public employees but included only individuals with positions of substantial actual or potential influence in the political arena (candidates for public office, a United States Congressman, members of the judiciary, high ranking police and military officers and federal and state executive officials of significant policy making authority). In the decades

following New York Times, a number of decisions have hinged upon exactly "how far down into the lower ranks of government employees that 'public official' designation would extend." It is submitted that a number of lower courts have grossly misinterpreted both New York Times and subsequent Supreme Court rulings by placing the lower echelons of government employees under the rubric of "public officials." Specifically, it is submitted that Mr. Reed, serving as an ordinary beat policeman, should not be subject to the stringent New York Times requirements.

In 1966, two years after New York Times, the Court in Rosenblatt v. Baer, 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966) was confronted with the question of how far down into the lower ranks of government employees the public official designation would extend. In Rosenblatt the Court rejected the suggestion that reference to state law standards would be controlling, and the Court attempted to delineate general federal guidelines for determination of "public official" status, noting that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation" (383 U.S. at 86). A concurring Justice Stewart emphasized this point by stating:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being---a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of a constitutional system" (383 U.S. at 92).

Although the Court recognized the need to protect an individual's reputation, it also acknowledged a "tension between this interest and the values nurtured by the First and Fourteenth Amendments"(383 U.S. at 86). Thus, the Rosenblatt Court attempted to set general guidelines for determining what types of government employees qualify as "public officials". With respect to the exact line of demarcation between the "public official" and the ordinary citizen, the Court stated:

> "It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs"(383 U.S. at 85).

In addition, the Court stated:

> "Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in New York Times are present and the New York Times malice standards apply" (383 U.S. at 86).

An important footnote caveat to this statement has been largely ignored by the lower courts. "Footnote thirteen" contradicts many of the lower courts which have applied the stringent New York Times requirements to lower-echelon government employees. In Footnote 13 (383 U.S. at p. 85), the Court in Rosenblatt noted that "merely because the statement defamatory of some person in government employ catches the public interest that this would not be in itself be sufficient to warrant the exacting first amendment protection of public official status." The Court further specifically rebutted the contention of concurring Justice Douglas that the key man in a government hierarchy might be a night watchman accused of taking state secrets and disregarded the notion advanced by Douglas that such a lower echelon employee should be required to comply with the New York Times criteria.

The conclusion of Rosenblatt was that in applying the general criteria of New York Times "that Rosenblatt may have held such a position of public official" but the Court did not hold that he fell within the public official classification. Rather the Court determined that it was a matter for the trial judge upon remand in the first instance to determine whether the proof showed that the plaintiff was a "public official". 383 U. S. at p. 88. This is a burden for the defendant to sustain and to show that the case is within the New York Times standard. If the defendant sustains that burden of proving public official status and thus the privilege granted by New York Times, then the plaintiff has the burden of proving the privilege was abused. In the instant case there was no

determination by the trial court in the first instance on the facts of this case that the Plaintiff was a public official but, it instead determined, as a matter of law, that the Plaintiff was a public official. It is submitted that the Defendant here had the burden of proving the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication. It was made clear in Rosenblatt that the question whether a person is a public official is to be determined not by state law standards but by standards announced by the U.S. Supreme Court. In the instant case it was incumbent on the trial court to find, by fact intensive analysis, that this Plaintiff was a public official based on one of the alternative tests of Rosenblatt. The appellate court in the instant case completely neglected to remark on this very important consideration.

In 1974, the Supreme Court addressed the question of the extent to which New York Times can be applied to private individuals. In Gertz v. Robert Welch, Inc. 418 U.S. 323, 94 S. Ct . 2997, 41 L .Ed. 2d 789 (1974), the Court conceded that the New York Times standard "exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test"(418 U.S. at 342). This led the Court to reject the Rosenbloom v. Metromedia, Inc., 403 U. S. 29, 29 L.Ed. 296, 91 S.Ct. 1811 (1971) plurality extension of New York Times to matters of "public or general interest". The Court delineated two distinctive differences between public and private persons:

> "The first remedy of any victim is self-help --- using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public official and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy" (Gertz, 418 U.S. at 344).

Secondly,

> "He [private individual] has not accepted public office or assumed an 'influential role in ordering society.' Curtis Publishing Co. v. Butts, supra, at 164, 18 L. Ed. 2d. 1094 (Warren, C. J., concurring in result). He has relinquished no part of his interest in the protection of his own good

> name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood" (418 U.S. at 345).

With these two differences, the Court concluded that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery"(418 U.S. at 345).

In Coursey v. Greater Niles Township Publishing Corporation, 82 Ill. App. 2d 76, 227 N.E. 2d 164 (1967), the appellate court held that in regard to a patrolman:

> "He is an important symbol of government, but the lowest in rank of police officials, and it cannot be said that he has 'substantial responsibility for or control over the conduct of government affairs.'" (227 N.E. 2d at 168).

The Illinois Supreme Court, however, reversed the appellate court in 40 Ill. 2d 257, 239 N.E. 2d 837 (1968). There the Court stated:

> "It is our opinion that the plaintiff is within the 'public official' classification. Although as a patrolman he is 'the lowest in rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly governmental in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers even at, and perhaps especially at, 'on the street' level than in the qualifications and conduct of other comparable low-ranking government employees performing more proprietary functions. The abuse of a patrolman's office can have great potentiality for social harm; hence, public discussion and public criticism directed toward the performance of that office cannot constitutionally be inhibited by threat of prosecution under state libel laws." (239 N.E. 2d at 841).

It is submitted that the course of treatment of the concept "public officials" by the United States Supreme Court would dictate that the "public official" definition for purposes of the constitutionally prescribed standard of defamation would not apply to a patrolman as a matter of law. The concept of "public official" is not based on whether or not the public official is performing a "primary function of local government" as opposed to whether it is a "proprietary function," nor does the "great potentiality for social harm" fit within the standards announced in Rosenblatt. The question is: Does the official have substantial responsibility for or control over governmental affairs?

In a 1979 decision, the U. S. Supreme Court again rejected the notion of an all encompassing "public official" status. Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed. 2d 411 (1979) casts doubt on how pervasively the term "public official" is to be construed. In that case, Senator Proxmire was the defendant. The suit stemmed from his "golden fleece of the month award." In April 1975 the award went to several government organizations that had spent almost half a million dollars to fund Hutchinson's research. At the time of the award, Hutchinson was Director of Research at the Kalamazoo State Mental Hospital, and was a state employee. He had also been an adjunct professor at Western Michigan University. The Supreme Court noted:

> "The District Court also concluded that Hutchinson was a 'public official.' 431 F.2d at 1327-1328. The Court of Appeals did not decide whether that conclusion was correct. 579 F.2d 1027, 1035 N. 14 (C. A. 7, 1978). We therefore express no opinion on the issue. The court has not provided precise boundaries for the category of 'public official,' and cannot be thought to include all public employees, however." (443 U.S. at 119 note 8).

The Court thereby again explicitly rejected the notion that mere public employment is synonymous with public official status.

The Court in Hutchinson also rejected the media "bootstrapping" of a private person into a "public figure" by press generated notoriety. The Court noted that "clearly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." 443 U.S. at 135.

From New York Times up through Hutchinson the Supreme Court has unequivocally refuted any suggestion that any and all government employees from the highest to the lowest echelons of governmental employment warrant treatment as "public officials". The severe incursions on a public employee's rights to redress for reputational injury do not apply to each and every public official. It is noteworthy that the Court has taken pains on three occasions to reject the suggestion that the merest governmental connection suffices for "public official" status-its night watchman analysis in Rosenblatt, its rejection of an attorney-officer of the court as a public official in Gertz and its footnote

8 in Hutchinson. It is also worthwhile noting that the Supreme Court has not held that anyone as low ranking as a policeman or as a teacher is a public official. In Time, Inc. v. Pape, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971) the Court accepted, without deciding, the lower courts' determination that deputy chief of detectives of the Chicago Police Department was a public official.

In St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), only one member of the Court denominated the deputy sheriff as a "public official." The Court, however, adopted for "purposes of this case only" the Louisiana court's determination that a parish sheriff was a "public official."

Although the Supreme Court has repeatedly rejected the notion of an all-encompassing public officialdom, a number of lower courts have ignored or misinterpreted the aforementioned caveats of Rosenblatt and Hutchinson. Specifically, a number of lower courts have extended "public official" status to the lower echelons of law enforcement officers. A number of these courts have followed the rationale of Coursey v. Greater Niles Township Publishing Corporation, 40 Ill. 2d 257, 239 N.E. 2d 837 (1968). Coursey did not confront Rosenblatt's "footnote thirteen." As stated above, Rosenblatt rejected the notion of including all lower-level governmental employees into the ranks of "public officials." Coursey failed to analyze the close relationship between the "night watchman" and an ordinary patrolman. Indeed, given the proper circumstances, both of these positions "can have great potentiality for social harm" (Coursey, 239 N.E. 2d at 841). A number of lower courts have followed this lead. These courts have drafted lower-level police officers into the ranks of "public officials," thus imposing the stringent New York Times requirements upon them. The U.S. Supreme Court has never placed "lower-level" employees under the rubric of "public officials." The course of treatment of the concept "public officials" by the Supreme Court would seem to dictate that the "public official" definition for purposes of the constitutionally prescribed standard of defamation would not apply to a patrolman. The

Supreme Court has consistently rejected the notion that all government employees should be subjected to the stringent New York Times burdens. "Footnote thirteen' of Rosenblatt constitutes a pivotal element in this delicate balancing of the competing reputational and free expression interests involved in the determination of status issues"(See Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria, 33 Buffalo Law Review 579, 667). Specifically, a "night watchman," a close relative to the beat policeman, is cited as not subject to "this test." As suggested herein, Hutchinson v. Proxmire also rejected the notion of an all encompassing New York Times standard.

Since Hutchinson however, there has been a growing number of cases reflecting a more sophisticated appreciation of the limitations of the "public official" concept. Thus it has been determined that a wide range of public employees are not "public officials". (See Elder, Defamation, Public Officialdom and the Rosenblatt v. Baer Criteria, 33 Buffalo Law Review 579, 640-643). In McCutcheon v. Moran, 99 Ill. App. 3d 421, 54 Ill.Dec. 913, 425 N.E.2d 1133 (1st Dist. 1981), the court held:

> "We are unwilling to place the imprimatur of 'public official' on a school teacher. Implicit in the reasoning of New York Times Co. v. Sullivan is the concept of a freedom of the governed to question the governor, of those who are influenced by the operation of government to criticize those who control the conduct of government. (Franklin v. Lodge 1108, BPOE (1979), 97 Cal.App.3d 915, 159 Cal.Rptr. 131). The relationship a public school teacher or principal has with the conduct of government is far too remote, in our minds, to justify exposing these individuals to a qualifiedly privileged assault upon his or her reputation.

More recently this court in Smith v. Copley Press, Inc., 140 Ill. App. 3d 613, 94 Ill.Dec. 785, 488 N.E.2d 1032 (4th Dist. 1986) determined:

> "Nevertheless, the Supreme Court cautioned that the 'public official' characterization, with the attendant application of the New York Times malice standards, should be reserved for those positions in government in which 'the public has [an] independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees ....'383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597, 605. . . ."

The comment by the Court in Hutchinson was reviewed in Berkley v. Delia, 287 Md. 302, 413 A.2d 170 (1980) in a case involving a policeman. In that case the court expressed some concern about the conclusion accepted by the district court and the parties that the plaintiff was a public official, and stated:

> "The question of whether he is or is not such a public official has not been briefed or argued to us. Accordingly, we prefer to decide the case assuming arguendo that he is such a public official and to leave open in Maryland the question of whether a police officer at the very bottom level is a public official within the meaning of New York Times. In so doing we act in a manner similar to that of the Supreme Court in Time, Inc. v. Pape, 401 U.S. 279, 284, 91 S. Ct. 633, 636, 28 L. Ed. 2d 45, where the two lower courts 'were in agreement that the plaintiff Pape was a "public official" by virtue of his position as Deputy Chief of Detectives of the Chicago Police Department, and that the charges (before the Court) concerned his "official conduct."'" (413 A.2d at 180).

It is submitted that the carefully balanced position taken in Rosenblatt must be read with the all encompassing view thereafter expressed in Rosenblum v. Metromedia, 403 U.S. 29, 29 L.Ed.2d 296, 91 S. Ct. 811 (1971), which was thereafter rejected in Gertz, v. Robert Welch, Inc., 418 U.S.323, 41 L.Ed.2d 789, 94 S. Ct. 2997 (1974). The Supreme Court has given recognition to an equitable and fundamentally fair compromise between inherently competing and inconsistent interests. The first interest is to protect the First Amendment rights of those persons who oppose individuals with actual or potential power over the conduct of governmental matters. Those individuals - "public officials" - who are in the position to influence the decision making processes relinquish appreciably their claim to protection of basic interest in reputation. The other interest at stake is the interest in personal reputation. The Court seems to have granted approximate parity to the two interests, treating the interest in reputation as an equally compelling need which must not be subjected to substantial depreciation.

This court should view with skepticism the law decided during the period prior to Gertz which resulted in many public official determinations being made based upon generalized references to public interests. The case of Coursey should be re-examined particularly in light of Hutchinson v. Proxmire.

It is submitted that the courts should determine that there is a group of public employees who are "public officials" as a matter of law - such as all elected officials, high placed appointed officials, etc. There is also a group of public employees who should, as a matter of law, be declared not to be "public officials," such as the court house janitor, the 'night watchman', the jailer and a whole host of other lower echelon public employees - including the ordinary beat policeman. The analysis in Gertz would more appropriately apply to the ordinary beat policeman than to the person who has substantial responsibility for the conduct of government affairs. There is also a group of public employees who should be tested in each individual case as to whether they are "public officials" as a matter of fact . If this court concluded that the Plaintiff in the instant case, an ordinary beat policeman, is not, as a matter of law, not a "public official" then whether or not he is a "public official" must be tested on the facts presented by the Defendants in support of their position that he is such a "public official". There are no facts in the record that show the Plaintiff had substantial responsibility for the conduct of government affairs or in any way held a position to meet the New York Times tests of a "public official".